



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

July 9, 2003

Ms. Joanne Wright  
Associate General Counsel  
Texas Department of Transportation  
125 East 11th Street  
Austin, Texas 78701-2483

OR2003-4731

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183910.

The Texas Department of Transportation (the "department") received a request for an electronic copy of the Brownwood District Management Directed Review ("MDR") 02-01, the date that text in the MDR was last modified or revised, a list of questions asked of the requestor in developing the MDR, a list of the requestor's responses to the questions, and the auditor's notes regarding the questions and responses. You claim that the requested information is excepted from disclosure under section 552.116 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes a copy of the MDR being sought by the requestor. The MDR is a completed audit report. You claim that this information is excepted from disclosure under section 552.116. However, section 552.116 is a discretionary exception that does not constitute other law for purposes of section 552.022.<sup>1</sup> Therefore, in accordance with section 552.022(a)(1), the MDR must be released.

We now address your claim under section 552.116 for the remaining information at issue. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You inform this office that the remaining information relates to an audit authorized by state law and performed by an internal auditor of the department. *See* Gov't Code §2102.007. You state that the auditor compiled this information during the course of a formal audit. It is apparent that one of the submitted documents was created after the completion of the audit and the MDR for the purpose of responding to one category of the requestor's public information request. This document, which we have marked, was not prepared or maintained in conducting the audit or preparing the audit report and is not an audit working paper under section 552.116(b)(2). With the exception of this marked document and

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<sup>1</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

the MDR that must be released in accordance with section 552.022(a)(1), the submitted information constitutes audit working papers under section 552.116(b)(2) and may be withheld from disclosure under section 552.116.<sup>2</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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<sup>2</sup>The requestor submitted written comments to this office pursuant to section 552.304 of the Government Code. The requestor references the department's statement in its May 5<sup>th</sup> letter to this office that "the audit regards various violations of established TxDOT policies." The requestor then states that a draft of the MDR indicated that there had been no violations of department policies, and he asks this office to look into this matter. We do not address this matter because the specific content of draft or final MDR findings is not relevant to the issue of whether the submitted information is excepted from disclosure as audit working papers under section 552.116.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Hattaway", written in a cursive style.

Karen Hattaway  
Assistant Attorney General  
Open Records Division

KEH/sdk

Ref: ID# 183910

Enc: Submitted documents

c: Mr. Thomas M. Dahl  
606 FM 2340  
Lampasas, Texas 76550  
(w/o enclosures)